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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT ET AL.....*Petitioners*

v. No. 595

A. J. JOHNSON.....*Respondent*

BRIEF FOR PETITIONERS IN REPLY

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In quoting from the decree of the Federal Court on p. 6 counsel do not refer to this portion:

> *And the said Commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.*

A person reading only the brief of the respondent would suppose that the suit was brought by the Commissioners in the ordinary course of their duties, and not as receivers of the Federal Court.

Counsel make no reference to the case of *Dickinson* v. *Mingea*, 191 Ark. 946, or to the case of *Rogers Paving Improvement District* v. *Swafford*, 193 Ark. 260, where it was held that if any debt of the District is in default for thirty days any creditors may have a mandatory injunction or a mandamus compelling the commissioners of the District to act as receivers of the Court.

Counsel cite casually the case of *Howard-Sevier Road Improvement Dist.* v. *Hunt*, 166 Ark. 62; but they do not undertake to explain away the plain language used in that case. There the Federal Court had rendered a judgment against the District for $380,000, and the Court said on page 71:

> "The District in that case represented the taxpayers, and they were bound by the judgment of the Federal Court."

They ignore entirely the language of the decision in that case which appears on page 72:

> "*As the district represented the taxpayers, it was bound to plead for them any defense that could have been set up* which would have rendered the bonds invalid, and a good defense would have been that, for any reason whatsoever, there was no valid assessment of benefits. *The district could, and should, have pleaded such defense for the benefit of the taxpayers.*"

In obedience to that command, when suit was brought in the Federal Court the District filed an answer (R. 32) in which it set up the decree in the case of *Fish* v. *Kersh Lake Drainage District* as *res judicata*. This defense was overruled by the District Court, and its decree was in all respects affirmed by the Circuit Court of Appeals. So far as we can see, that is an absolute answer to the contention of respondent that the decree in the Fish case is a bar.

From the statement of Johnson, appearing on page 9, it might be inferred that Johnson had paid his entire debt, when in fact, both the complaint and decree in his case showed that he had paid only $1628.00 upon a debt of $1600 bearing interest at six per cent per annum for twenty years. The same facts appear in the Fish case. The report of the auditor (R. 10) shows the amount of each original assessment on each tract of land, and if the amount of this original assessment had been paid on any tract, it was wiped off the assessment book.

On page 11, counsel say that the only question involved in the case in the Federal Court was the right to compel the District to bring suit for the collection of the delinquent taxes. Three questions were presented in that case: First, did the benefits bear interest? Second, was the decree in the Fish case *res judicata?* Third, should the commissioners of the District he required to act as receivers of the Federal Court?

All these questions were decided in favor of the plaintiff, and the decree of the District Court was affirmed by the Circuit Court of Appeals.

Counsel say on page 12 that the decree of the Federal Court left individual taxpayers free to interpose any defense they desired. This is not true. As was decided in *Howard-Sevier Road Improvement Dist.* v. *Hunt,* 166 Ark. 62, all the taxpayers were bound by the decree in the Federal Court. Of course, if a taxpayer had a defense which was entirely peculiar to him and not affected by that decree, he could set it up. For example, he could set up that he had paid his entire assessment with six per

cent interest from the date of the passage of the acts of 1913 or 1919, or he might have shown that his land was not within the bounds of the District and had been assessed by mistake; but the defenses that the assessment of benefits did not bear interest, and that the decrees in the Lincoln Chancery Court were bars to the action for the collection of the assessments brought by the Commissioners as receivers of the Federal Court were entirely precluded by the decision there. Both defenses had been put in issue, and both had been ruled against the inhabitants of the District, who were represented by the Commissioners. If every landowner were allowed to set up the defenses which the District had pleaded in the Federal Court there would be no end to litigation, and no improvement district would ever be able to sell a bond.

Counsel say on page 18 that the holders of judgments in the Federal Court were not injured because the only proper persons in the suit in the Lincoln Chancery Court were the taxpayers on the one side and the District on the other. There might have been some plausibility in that argument if the commissioners had instituted a suit for the collection of the taxes and had conducted it in good faith and the taxpayers defended it. The decrees in the Lincoln Chancery Court, which are pleaded as *res judicata*, were not suits for the collection of taxes. They were suits for injunction, brought by three taxpayers, whose lands were of insignificant extent, as will appear by reference to the audit beginning on page 10. No other taxpayer complained, no other taxpayers were parties to the suits; but in these suits, lands on which the assessments aggregated $197,630 belonging to 102 property owners, were relieved of the burden of assessment.

On page 18, counsel say that it must be presumed that the State Bank & Trust Company of Wellston knew of the suits for injunction brought in the Lincoln Chancery Court. Of course no such presumption can be indulged. It does not even appear that at that time the Bank was a creditor of the District. At the time of taking the judgment in 1935 it held a large number of the certificates of indebtedness, but these may have all been acquired in the interval between 1932 and the date of the judgment.

Counsel, on page 19, refer to the case of *Barkley* v. *Levee Commissioners*, 93 U. S. 258. That case only holds that where a levee district has been abolished and has no officers, there is no one against whom a mandamus can run. We fail to see its application to the case at bar.

On page 21, counsel say that State and Federal Courts are entirely independent of one another, and that nothing done in one court can affect what the other court should do. However, it must be admitted that the decree of either is *res judicata* and can be pleaded in a subsequent suit involving the same matter in the other court. That was exactly what was done in this case. The District pleaded the decree of the Lincoln Chancery Court of 1932 as *res judicata*, as a bar to the suit in the Federal Court where the plea was overruled.

Counsel say, on page 26, that the Federal Court did not attempt to decide the liability of the individual tracts of land. The decree of the Federal Court directs the officers to "extend the taxes against *each tract of land, railroad and tramroad in the District.*" It had overruled the plea that the assessment did not bear interest and its decision was *res judicata*. The Supreme Court of Arkansas, however,

treats it as nothing at all, and thereby denies to it all faith and credit.

Counsel say (page 28) that the statement of Felley is not clear; but it was introduced by the defendants, and sofar as we can see it is perfectly clear. Counsel say that it shows delinquent benefits of $39,899.30, and assessed benefits unpaid of $52,119.40, making a total of $92,018.70. It is apparent that the $39,899.30 of delinquent benefits are included in the $52,119.40 of assessed benefits. If they were not assessed they could not be delinquent, and if they were delinquent they were still assessed benefits unpaid.

Our contention that unpaid assessed benefits of $52,119.40 include the delinquent benefits of $39,899.30 is supported by an analysis of the statement which was filed by Mr. Felly. In order to arrive at the unpaid assessed benefits, the witness very evidently deducted the taxes levied to date ($308,655.65) from the total assessed benefits ($310,543.85), resulting in a difference of $1,878.20. His statement shows that there were delinquent taxes of $39,899.30, and that there were overpaid assessed benefits of $10,351.90. These three items were then added as follows:

Assessed Benefits for which no taxes had been levied	$ 1,878.20
Delinquent taxes	39,899.30
Assessed benefits overpaid	10,351.90
Total	$52,129.40

This total is the identical figure given by the witness for assessed benefits unpaid, except for an error of exactly $10.00, which doubtless resulted from a mistake in copying

one digit of one of the numbers. Therefore, the item of delinquent taxes is included in the item of the assessed benefits unpaid, and counsel for respondent (p. 28) are in error in their statement.

It is evident that if the lands released by the decrees of 1931 and 1932 are not to be charged with interest upon their assessments, the creditors of the District will be unable to collect their judgments.

Counsel say that the decree of the Federal Court only established the amount of the indebtedness. Counsel overlook the fact that there were two decrees. The amount of the indebtedness was settled in the first suit of *Kersh Lake Drainage Dist.* v. *State Bank & Trust Company of Wellston*, 85 Fed. (2d) 643. The second suit, which appears in 92 Fed. (2d) 783, was a suit based upon the original decree and brought for the purpose of having the Commissioners made the receivers of the Federal Court as authorized by the State statute and decisions, and for compelling them to bring suit as such receivers for the collection of the delinquent taxes. In the first suit nothing was decided except the amount of the indebtedness. In the second, the three issues of which we have spoken were presented, and decided, and the decree affirmed by the Circuit Court of Appeals.

Respectfully submitted,

GEORGE B. ROSE,

Counsel for Petitioners.